

**JANET G. HOWARD**  
Claimant

**GARAGE DOOR GROUP, INC.**  
Respondent

**CNA**  
Insurance Carrier

The Board has adopted the stipulations listed in the Award.

### **ISSUES**

The Administrative Law Judge (ALJ) awarded claimant a 2 percent permanent partial disability for a scheduled right shoulder injury resulting from an August 26, 1998, work-related accident. Furthermore, the ALJ awarded claimant .20 weeks of temporary total disability compensation, ordered respondent to pay all reasonable related medical expenses, unauthorized medical expense and future medical care upon application and approval.

On appeal, claimant contends her testimony coupled with the persuasive medical opinions of Dr. William A. Bailey, M.D. proves that claimant's August 26, 1998, work-related accident resulted in a 6 percent whole body permanent functional impairment and a permanent partial general disability award of 37 percent based on a work disability. Furthermore, claimant contends she proved she is entitled to eight weeks of temporary total disability compensation instead of the .20 weeks awarded by the ALJ. Claimant also raised as an issue before the Board her pre-injury average weekly wage. But, at oral argument, the parties stipulated to the ALJ's finding that the claimant's pre-injury average wage was \$391.83.

Conversely, respondent contends that the ALJ's award limiting claimant to a 2 percent permanent partial disability of a scheduled right shoulder injury should be affirmed. The respondent also appealed but only questioned the ALJ's finding in the Award that William A. Bailey, M.D. was claimant's authorized treating physician. At oral argument before the Board, the parties stipulated that the ALJ erred and William A. Bailey, M.D. was not the authorized treating physician. In fact, Dr. Bailey saw claimant at the request of her attorney.

In summary, the two issues for the Board review are the nature and extent of claimant's disability and whether claimant is entitled to additional temporary total disability compensation.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and hearing the parties' arguments, the Board finds the Award should be modified to find claimant has a general body disability and to award claimant a work disability.

#### **Findings of Fact**

1. Claimant started working for respondent as a janitor on April 17, 1994.
2. Claimant worked second shift from 3:30 p.m. to 12:00 midnight.

3. As a janitor, claimant was responsible for cleaning offices and restrooms located in respondent's manufacturing plant. Her job duties consisted primarily of sweeping, dusting, mopping, hauling and dumping trash.

4. On August 26, 1998, at about 5:30 p.m., claimant opened the door to one of the men's restrooms she was assigned to clean. As claimant stepped into the restroom to turn on the light, she stepped into some soapy water that caused her feet to slip out from under her. She fell backwards landing on her left side and then bounced on the concrete floor to her right side. Claimant could not get up and screamed for somebody to help her.

5. Two young men helped claimant up and took her to Lawrence Memorial Hospital emergency room where claimant was examined by the emergency room physician.

6. The hospital emergency department records show that claimant had complaints of pain in various areas of her body including her left shoulder, right shoulder, right hip, left thigh, left ankle, right elbow, and left knee. X-rays were ordered for claimant's right shoulder, right elbow, left knee, left hip and a lumbar spinal series.

7. The x-rays showed no fractures but did show the claimant had degenerative disk disease at L5-S1 and an osteoarthritis condition that affected all of her joints that were x-rayed.

8. Claimant was released from the hospital emergency department with instructions to take ibuprofen for pain, wear a sling on her right arm and an immobilizer on her left knee. She was also instructed to follow up with the respondent's company physician Chris D. Fevurly, M.D.

9. Claimant testified that the day after the fall her body hurt all over.

10. On August 27, 1998, the day after her fall, she received follow up treatment from Dr. Fevurly at the Lawrence Memorial Hospital Occupational Health Department. Dr. Fevurly found claimant with multiple bruises and conclusions but no fractures. He took claimant off work for four days.

11. On September 22, 1998, Dr. Fevurly took claimant off work for another six days for physical therapy treatment. During that visit, the doctor found claimant had recurrent left shoulder pain and low back pain.

12. Over the next three months, Dr. Fevurly continued to treat claimant with physical therapy and medication for multiple areas of pain that she suffered due to her August 26, 1998, traumatic fall. He returned claimant to work with restrictions that limited her lifting from 10 pounds to 25 pounds with alternating sitting and standing as needed for

pain. He also had claimant gradually return to her regular work duties starting with two hours per day, then four hours per day, working up to a full eight hour shift.

In Dr. Fevurly's medical note dated November 25, 1998, claimant continued to have pain and discomfort in her left upper arm and shoulder plus continuing symptoms in her low back and cervical spine.

13. During the time claimant was treated by respondent's company physician, Dr. Fevurly, she also was seen by Michael J. Geist, M.D. and William A. Bailey, M.D.

14. Dr. Geist is an emergency care and occupational medicine physician practicing in Lawrence, Kansas for the past 12 years. Dr. Geist had previously treated claimant for other injuries and health problems before claimant's August 26, 1998, accident.

The doctor saw claimant on September 15, 1998, on an emergency basis for low back pain that she had suffered that evening at work. After Dr. Geist examined claimant, he referred her to the hospital emergency department because he thought claimant possibly had some other health problems that were causing her back pain. After the emergency physician examined claimant, she was admitted to the hospital. Claimant underwent multiple diagnostic testing to rule out heart problems and was found to have a low potassium level.

15. At respondent's insurance carrier's request, Dr. Geist saw claimant for a second opinion on November 30, 1998. Dr. Geist found claimant with complaints of diffused tenderness throughout her cervical, trapezius and upper thoracic back region, into both shoulders. Dr. Geist's clinical impression was that claimant was suffering from chronic pain the majority of which was related to claimant's significant arthritic condition. He went on to opine that claimant's fall at work certainly could have exacerbated claimant's symptoms but he did not believe claimant suffered any permanent functional impairment as a result of the fall. The doctor further concluded that because of claimant's age, her very small stature, and her significant arthritic condition, that it was going to be difficult for her to continue to perform the heavy physical labor required for claimant to complete her janitor job duties.

16. At claimant's attorney's request, orthopedic surgeon Dr. Bailey saw claimant during the same period of time that claimant was treated by Dr. Fevurly and Dr. Geist. Dr. Bailey saw claimant for the first time on October 1, 1998. Claimant gave him a history of falling at work on August 26, 1998. By this time, some of claimant's symptoms had improved from a series of physical therapy treatments she had completed. Her low back, right elbow and left knee symptoms had improved. The most significant continuing problems were her left shoulder and pain running down her left arm. Dr. Bailey referred claimant for further physical therapy treatments.

17. Dr. Bailey saw claimant next on October 13, 1998. At that time, claimant had attempted a work-hardening program prescribed by Dr. Fevurly. Claimant attempted this program for one day and then could hardly move the next day. She did not attend any more of the prescribed sessions.

Dr. Bailey found claimant was not benefitting from the work-hardening and the physical therapy sessions. Dr. Bailey wrote claimant a note stating that claimant was unable to attend work-hardening and was unable to perform her duties as a janitor.

At that particular time, however, respondent was providing claimant with accommodated work according to Dr. Fevurly's restrictions.

18. Dr. Bailey continued to follow claimant for left shoulder pain and low back pain. On November 10, 1998, he imposed restrictions on claimant's work activities of lifting limited to 20 pounds and no repetitive bending or stooping.

19. On January 26, 1999, Dr. Bailey saw claimant and opined that claimant was not capable of performing her janitorial job duties emphasizing the mopping portion of her job duties. Dr. Bailey further opined that claimant's traumatic fall that occurred at work on August 26, 1998, either aggravated or accelerated her preexisting arthritic condition. Utilizing the AMA Guide to the Evaluation of Permanent Impairment, Fourth Edition, he found claimant had suffered a 5 percent permanent functional impairment of the body as a whole for her left shoulder chronic rotator cuff tendinitis and lumbar strain.

Dr. Bailey continued to treat claimant intermittently through November 2, 1999. On November 2, 1999, Dr. Bailey found claimant with left knee pain and swelling that claimant had noticed when she awoke on October 30, 1999. X-rays showed early degenerative changes in the left knee. The doctor attributed the left knee pain and swelling to a flare up of the left knee injury that claimant suffered as a result of the August 26, 1998, accident. Dr. Bailey went on to opine that claimant had an additional 1 percent impairment of function as a result of this left knee problem for a total of 6 percent permanent functional impairment of the body as a whole rating as a result of the August 26, 1998, accident.

20. Dr. Bailey was also requested to review a list of work tasks claimant had performed in jobs she was employed in the 15 year period next preceding her August 28, 1998 accident. At claimant's attorney's request, vocational expert Dick Santner interviewed claimant and compiled the job task list. Dr. Bailey reviewed the 16 job tasks and based on the restrictions he had imposed on claimant's work activities as a result of her work related injuries determined that claimant could not perform 5 of those 16 job tasks for a 31 percent loss of job task performing ability.

21. Before claimant's August 26, 1998, accident, she testified she had a good attendance record and was otherwise physically able to satisfactorily perform her janitorial

job duties for respondent. But, after her traumatic fall at work, claimant testified she missed work because of her injuries for eight weeks for the period from her date of accident through November 30, 1998. Admitted into the regular hearing record was a schedule claimant had prepared for that period of time which claimant alleged indicated the work that she had missed because of her injuries. But claimant could only verify that she missed work because of her injuries for the two times Dr. Fevurly took her off work for four days on one occasion and six days on another occasion for a total of ten days instead of the eight weeks she claimed.

22. Respondent provided claimant with accommodated work within the restrictions imposed by treating physician Dr. Fevurly. When claimant was restricted to ten pounds and fifteen pounds lifting limit, respondent provided claimant with a light duty job of bagging small parts where she could alternate sitting and standing. Additionally, respondent accommodated claimant by returning her to work part of the day on light duty and then the other part of her day performing her janitorial duties.

23. Thereafter, respondent notified claimant she had to perform her regular janitorial duties including mopping. Respondent concluded that claimant's janitorial job duties were within the restrictions imposed by Dr. Geist on November 30, 1998, of limiting lifting, pushing and pulling to twenty pounds.

Claimant, however, refused to do the mopping. Claimant testified she had tried to mop but could not push the heavy industrial mop as required because she did not have the strength in her hands anymore and the mopping caused increased pain in her shoulders, arms, and back. Because the industrial mop weighed, even wet, less than the 20 pound lifting restriction, respondent terminated claimant in a letter dated January 22, 1999. The termination letter indicated that claimant was being terminated for refusing to perform mopping which was an essential part of her janitorial job.

24. The ALJ appointed orthopedic surgeon Don B.W. Miskew, M.D. of Shawnee Mission, Kansas, to perform an independent medical examination of claimant. Dr. Miskew saw claimant on one occasion on February 17, 2000. Before the examination, Dr. Miskew had been supplied with claimant's previous medical treatment records for review. After taking a history from claimant and conducting a physical examination of claimant, Dr. Miskew found claimant with complaints of low back and bilateral hip pain with no radiculopathy. He further found claimant with complaints of pain in her upper arms; numbness and swelling in her hands; significant pain in her left shoulder; and her right shoulder only bothered her minimally. He found that claimant's initial left knee injury had resolved.

Dr. Miskew concluded that claimant suffered injuries as a result of the August 26, 1998, fall at work. Based on his review of the emergency room treatment records after the fall, he opined that claimant only injured her right shoulder and left knee. The left knee

injury had resolved but the right shoulder had not, despite it having been treated by several physicians. Dr. Miskew did not relate claimant's low back complaints to the work-related injury. His interpretation of the medical treatment records had indicated that the low back problems had not commenced until five days after the accident. Dr. Miskew concluded the August 26, 1998, fall aggravated claimant's preexisting arthritic condition in her right shoulder resulting in a 1 to 2 percent permanent functional impairment of the right shoulder superimposed on her preexisting arthritic problems.

25. Despite her preexisting arthritic condition, her small physical stature (4' 8" and 126 pounds), and her age of 62 years, claimant was physically capable of performing all of her janitorial duties with respondent before the August 26, 1998, accident. Claimant testified that, after the accident, she simply could not physically perform the mopping required of the janitorial job.

26. After respondent terminated claimant, she applied for and received unemployment benefits. Admitted into evidence at the regular hearing, was a list of companies claimant had contacted or made an application in an effort to find employment starting on January 22, 1998, the day after her last day worked and continuing through May 15, 2000, the day claimant started working for Days Inn Motel.

27. In April 1999, claimant found her first job after her accident with Brahler Products and she worked there until the company closed the plant on January 31, 2000. Claimant testified she worked full time starting at \$5.15 per hour and ending at \$5.42 per hour. Thereafter, claimant worked partial days for two other employers but could not handle the job duties because of the problems she experienced with her hip and legs.

On May 15, 2000, claimant started working at Days Inn Motel as a housekeeper earning \$6.00 per hour working 40 hours per week. Claimant was working at Days Inn on July 20, 2000, the date of the continuation of the regular hearing.

### **Conclusions of Law**

1. In proceedings under the Workers Compensation Act, claimant has the burden to prove by preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which the right depends.<sup>1</sup>

2. K.S.A. 1998 Supp. 44-510(e) defines work disability as the average of the wage loss and task loss:

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<sup>1</sup>See K.S.A. 1998 Supp.44-501(a) and K.S.A. 1998 Supp. 44-508(g).

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen year period proceeding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the workers is earning after their injury.

3. K.S.A. 1998 Supp. 44-510e also specifies that a claimant is not entitled to permanent partial general disability compensation in excess of functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

4. The wage component of the work disability test is based on the actual wage loss only if the claimant has shown good faith in efforts to obtain or retain employment after their injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in a work disability calculation.<sup>2</sup>

5. Even if no work is offered, claimant must show that he or she made a good faith effort to find appropriate employment. If claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.<sup>3</sup>

6. But claimant should not be limited to functional impairment where the claimant attempted the offered work and was not able to perform the work because of the claimant's work-related injury.<sup>4</sup>

7. The ALJ found claimant proved that the only portion of her body that sustained a permanent injury in her work related fall was her right shoulder. The ALJ based this conclusion on Dr. Miskew's one-time examination of claimant. Relying primarily on the emergency room records, Dr. Miskew opined that claimant sustained injuries to only her right shoulder and left knee as a result of her fall. He further opined that claimant's left knee injury had resolved.

8. The Board, however, disagrees with the ALJ and concludes that the more persuasive medical opinion contained in the record is that of orthopedic surgeon Dr. Bailey,

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<sup>2</sup>See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>3</sup>See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>4</sup>See Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).



who treated claimant from October 1, 1998, through November 2, 1999, seeing claimant on 13 separate occasions. Dr. Bailey opined that the traumatic fall claimant suffered at work on August 26, 1998, permanently aggravated her preexisting arthritic condition or otherwise caused permanent injury to her left shoulder, low back and left knee. Claimant testified and the emergency room records verified that claimant suffered multiple injuries to her body from the fall. Although the emergency room physician, at that time, only diagnosed shoulder contusion and knee contusion, he also ordered an x-ray examination of claimant's lumbar spine. Dr. Fevury's medical records indicate that when he saw claimant the day following the accident he diagnosed claimant with multiple bruises and contusions and later noted he was treating claimant for recurrent left shoulder pain and recurrent low back pain.

The Board concludes, therefore, based on claimant's testimony and the more persuasive medical opinion of Dr. Bailey that claimant suffered permanent injury to her left shoulder and low back as a result of her traumatic fall at work on August 26, 1998. The Board adopts Dr. Bailey's 5 percent whole body permanent functional impairment opinion based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Bailey found claimant had a 3 percent permanent functional impairment of the lumbar spine and a 2 percent permanent functional impairment of the left shoulder and combine those whole body impairments for a 5 percent permanent functional whole body impairment.

The Board also notes that Dr. Bailey, during his deposition testimony, assessed claimant with an additional 1% whole body permanent functional impairment for her left knee injury. This rating was based on claimant waking up on October 30, 1999, more than a year after the August 26, 1998, accident with pain and swelling in her left knee. Dr. Bailey opined that he "supposed another percent would probably be attributable to her knee problem." The Board concludes that this additional 1 percent was not an opinion based on reasonable medical probability and, therefore, the additional 1 percent will not be adopted by the Board.

9. Having found claimant suffered a whole body permanent functional impairment, the next question is whether claimant is entitled to a work disability. Respondent argues claimant was terminated because she refused to perform the mopping job function that was an essential function of her job as a janitor. The respondent contends that the mopping job function was within claimant's permanent restriction of lifting 20 pounds and she therefore retained the post-injury ability to perform this function.

The Board disagrees. Claimant established through her testimony that regardless of her preexisting arthritic condition, before her fall, she was capable of performing all of the job duties required of a janitor while working for the respondent including the mopping. But, after the fall, claimant was unable to do the heavy industrial mopping because she had lost strength in her hands and the mopping caused her pain in her shoulders and low back.

Additionally, Dr. Bailey, after reviewing the claimant's job description, determined that one of the functions of the janitor job claimant was unable to do because of injuries was the job function of mopping. The Board concludes, after claimant's traumatic fall, claimant was no longer physically capable of performing the mopping portion of her janitor job because of her work related injuries. Thus, claimant is entitled to a work disability, if her post-injury earnings are not equal to 90 percent or more of her pre-injury average weekly wage.

10. Claimant's last day worked for the respondent was January 21, 1999. Claimant presented evidence that she started looking for employment the next day on January 22, 1999. Claimant then found other employment and when claimant last testified at the continuation of the regular hearing on July 20, 2000, she was employed full time as a housekeeper at Days Inn Motel. This evidence on claimant's post-injury efforts to find appropriate employment was uncontradicted. The Board, therefore, concludes, claimant made a good faith effort post-injury to find appropriate employment.

11. Claimant's post-injury employment paid wages less than 90 percent of her pre-injury average weekly wage of \$391.83. Thus, the Board concludes, claimant is entitled to a work disability, if the work disability exceeds claimant's 5 percent permanent functional impairment.

12. After claimant's August 26, 1998 accident, the Board concludes claimant proved she was taken off work by her authorized treating physician for a total of 10 days. Claimant failed to prove that she missed a total of 8 weeks as alleged because of her work injuries. Because claimant was not off work for 3 consecutive weeks, claimant is not entitled to temporary total disability compensation for the first week.<sup>5</sup> Thus, claimant is entitled to three days of temporary total disability compensation.

13. Thereafter, until claimant's last day worked of January 21, 1999, claimant is entitled to permanent partial general disability benefits based on her 5 percent permanent functional impairment because she had returned to work for the respondent earning a comparable wage. Then from January 21, 1999, until March 31, 1999, claimant made a good faith effort to find employment and failed to do so. For that period, claimant is entitled to a 65.5 percent work disability based on a 100 percent wage loss and a 31 percent task loss

14. Claimant commenced working for Brahler Products on April 1, 1999, and worked for Brahler until the plant closed on January 31, 2000. During that period, claimant earned an average of \$5.34<sup>6</sup> per hour working full time or 40 hours per week earning

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<sup>5</sup>See K.S.A. 1998 Supp. 44-510c(b)(1).

<sup>6</sup>This is an average of \$5.15 per hour starting wage and a \$5.42 per hour ending wage as established by claimant's testimony.

\$213.60 per week. During that period, claimant is entitled to a 38 percent work disability based on a 45 percent wage loss and a 31 percent task loss.

15. The claimant was unemployed after working for Brahler but made a good faith effort to find employment from February 1, 2000 to May 14, 2000. During that period, claimant is entitled again to a 65.5 percent work disability based on 100 percent wage loss and a 31 percent wage loss.

16. On May 15, 2000, claimant started working full-time for Days Inn Motel earning \$6.00 per hour. Thereafter, claimant is entitled to a 35 percent work disability based on a 39 percent wage loss and a 31 percent task loss.

17. Claimant started receiving Social Security retirement benefits on January 1, 2000, in the amount \$512 per month and at the time she testified at the continuation of the regular hearing on July 20, 2000, claimant was receiving Social Security retirement benefits in the amount of \$525 per month. The Board concludes, that commencing January 1, 2000, claimant's weekly permanent partial disability benefits are required to be reduced by \$118.15<sup>7</sup> per week and after July 20, 2000, the weekly permanent partial disability benefits are required to be reduced by \$121.15<sup>8</sup> per week.<sup>9</sup>

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that ALJ Brad E. Avery's October 4, 2000, Award should be modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Janet C. Howard, and against respondent, Garage Door, Group, Inc., and its insurance carrier, CNA, for an accidental injury which occurred on August 26, 1998, and based upon an average weekly wage of \$391.83.

Claimant is entitled to .43 weeks of temporary total disability compensation at the rate of \$261.23 per week or \$112.33, followed by 20.71 weeks of permanent partial disability compensation at the rate of \$261.23 per week or \$5,410.07 for a 5 percent permanent partial general disability through January 21, 1999, followed by 9.86 weeks of

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<sup>7</sup> Claimant's monthly Social Security retirement benefit of \$512 per month times 12 months divided by 52 weeks.

<sup>8</sup> Claimant's monthly Social Security retirement benefit of \$525 per month times 12 months divided by 52 weeks.

<sup>9</sup> See K.S.A. 1998 Supp. 44-501(h).

permanent partial disability compensation at the rate of \$261.23 per week or \$2,575.73 for a 65.5 percent permanent partial general disability through March 31, 1999, followed by 39.28 weeks of permanent partial disability compensation at the rate of \$261.23 per week or \$10,261.11 for a 38 percent permanent partial general disability through December 31, 1999, followed by 4.43 weeks of permanent partial disability compensation at the reduced rate of \$143.08<sup>10</sup> per week or \$633.84 for a 45 percent permanent partial general disability through January 31, 2000, followed by 14.86 weeks of permanent partial disability compensation at the reduced rate of \$143.08 per week or \$2,126.17, for a 65.5 percent permanent partial general disability through May 14, 2000, followed by 9.43 weeks of permanent partial disability compensation at the reduced rate of \$143.08 per week or \$1,349.24, for a 35 percent permanent partial general disability through July 19, 2000, followed by 46.68 weeks of permanent partial disability compensation at the reduced rate of \$140.08<sup>11</sup> per week or \$6,538.93, for a 35 percent permanent partial general disability, making a total award of \$29,007.42, all of which is presently due and owing less amounts previously paid.

Respondent is ordered to pay all authorized medical expenses.

Claimant is entitled to an unauthorized medical allowance in the statutory maximum of \$500.

Claimant is entitled to future medical upon proper application and approval by the Director.

All remaining orders contained in the Award are adopted by the Board.

**IT IS SO ORDERED.**

This \_\_\_\_\_ day of August, 2001.

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BOARD MEMBER

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BOARD MEMBER

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<sup>10</sup>This is the weekly compensation rate reduced by the \$118.15 per week claimant received in Social Security retirement benefits.

<sup>11</sup>This is the weekly compensation rate reduced by the \$121.15 per week claimant received as Social Security retirement benefits.

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BOARD MEMBER

cc: Eugene C. Riling, Lawrence, Kansas  
Clifford K. Stubbs, Lenexa, Kansas  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director of Workers Compensation